

EXHIBIT A

In the Matter Of:

Hearing on SSB 5059 BEfore Sen. Law & Jus.Comm

TESTIMONY OF SEN. DAVID FROCKT

January 20, 2015



VIDEO TRANSCRIPTION

HEARING ON SSB 5059 BEFORE THE SEN. LAW &
JUS. COMM, (TESTIMONY OF SEN. DAVID FROCKT)
(JAN. 20, 2015), RECORDING BY TVW,
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JANUARY 20, 2015

The video proceedings were stenographically
transcribed by:
Erica Field, FPR

1 Thereupon,

2 the following proceedings were had:

3 MR. CHAIRMAN: January 20, 2015.

4 Our first item up on the agenda is

5 Senate Bill 5059. Senator Frockt is

6 the prime sponsor. If he arrives here

7 in a little bit, of course we'll allow

8 him to testify.

9 Go ahead, Mr. Ford.

10 MR. FORD: Good morning. My

11 name is Tim Ford, counsel for the

12 committee. Senate Bill 5059 is about

13 bad faith assertions of patent

14 infringement.

15 Patent law is based in the U.S.

16 Constitution and federal law under

17 Article 1, Section 8, Clause 8 of the

18 United States Constitution.

19 A patent is an intellectual

20 property right granted by government

21 to an inventor to exclude others from

22 making, using, offering for sale, or

23 selling an invention. Generally, the

24 term of a new patent is 20 years from

25 the date on which the application for

1 the patent was filed with the U.S.

2 Patent and Trademark Office.

3 There's no legal requirement for
4 a patented invention to actually be
5 developed. A patent right may be
6 sold, assigned, or licensed.

7 Senate Bill 5059 creates the
8 Patent Troll Prevention Act as a new
9 chapter in Title 19. A person may not
10 make assertions of patent infringement
11 in bad faith. An assertion of patent
12 infringement is when a person sends a
13 demand threatening a target with
14 litigation while asserting that the
15 target infringed a patent or that the
16 target should obtain a license in
17 order to avoid litigation.

18 In a lawsuit, a court may
19 consider certain nonexclusive factors
20 as evidence of good faith or bad
21 faith. Bad faith factors include
22 whether a demand does not include
23 specific information such as a patent
24 number, the name and address of the
25 patent owner, and facts relating to

1 specific areas and how the target --
2 and how the target is infringing on
3 the patent or failing to provide that
4 information.

5 A violation is an unfair or
6 deceptive act under the Consumer
7 Protection Act, and the attorney
8 general is authorized to bring an
9 action under the Consumer Protection
10 Act in the name of the state or on
11 behalf of the person residing in the
12 state.

13 MR. CHAIRMAN: All right. Any
14 questions for Mr. Ford?

15 Mr. Ford, there's a relatively
16 recent court case, isn't there,
17 dealing with these issues that is
18 favorable to the intent and spirit of
19 the legislation?

20 MR. FORD: There has been some
21 recent litigation. Other states have
22 adopted a few of those statutes and
23 state law. And I don't believe the
24 U.S. Supreme Court has ruled, but I
25 will check on that for you.

1 MR. CHAIRMAN: If there was some
2 federal legislation, I would
3 appreciate if you would get that
4 legislation and distribute it to
5 members of the committee.

6 MR. FORD: Very well.

7 MR. CHAIRMAN: We do have
8 Senator Frockt here as a prime sponsor
9 representing the -- come on up,
10 Senator Frockt -- representing the
11 46th District and especially the very
12 vibrant neighborhood of Hawthorn
13 Hills.

14 MR. FROCKT: Thank you,
15 Mr. Chairman. I know that's where you
16 grew up. So thank you for the kind
17 words.

18 Okay. Well it's 8:00 in the
19 morning. This is early. Haven't had
20 my coffee yet, but I'm here, and thank
21 you very much for hearing the bill.

22 When the attorney general came
23 to me and asked me -- and I want to
24 also speak up for Senator Fain, who
25 cannot join us this morning. He's

1 cosponsoring the bill as number two --
2 a couple of other members have signed
3 the bill -- of the committee.

4 When he came to me and talked to
5 me about the problem and I started
6 looking at the problem of patent
7 trolling essentially and sort of the
8 problems they have had at the federal
9 level, the first question I asked is
10 are we preempted in some way, and the
11 answer is there's some capacity for us
12 to enforce under our consumer
13 protection laws.

14 And so I think this is a very
15 good effort that he's put forward
16 here. And in particular, I think that
17 the fact that attorney general will
18 kind of serve as a gatekeeper for
19 enforcement of these actions is
20 important and will prevent sort of a
21 reverse abuse from happening. I think
22 that's very important.

23 We know that 55 percent of the
24 targets of these kinds of activity are
25 small businesses, and we know

1 apparently, according to the data from
2 some of the organizations that are
3 tracking this, 18 percent of them give
4 into demand without actually fighting
5 the alleged enforcement of the patent.

6 And I think back to my time as
7 litigator -- I'm not really practicing
8 right now -- but in a situation, if I
9 were defending a company that really
10 was not doing anything wrong and just
11 participating in their normal business
12 activities using a piece of technology
13 or product or what have you, it would
14 be very expensive for that business to
15 go and hire a lawyer and have that
16 lawyer go and perhaps be able to get
17 the case dismissed quickly but still
18 to file a Rule 11 challenge to the
19 litigation, to file a 12(B)(6) motion
20 to dismiss right off the top would
21 cost that small business a lot of
22 money.

23 So I think this is a good effort
24 at deterrence, and I think it give the
25 state a legitimate enforcement tool

1 the try to stop these kinds of
2 activity.

3 I did get one comment from --
4 and some of you -- Mr. Chairman you
5 may have received the letter as
6 well -- from a party called
7 Intellectual Ventures, and they had
8 some concerns about universities and
9 whether or not they should somehow be
10 exempt from enforcement under this
11 through their patent management and
12 intellectual property management
13 offices. So I would obviously defer
14 to the committee to take a look at
15 that and examine that question.

16 MR. FORD: Thank you very much,
17 Senator Frockt. We did have a hearing
18 on this in the Spokane Valley in
19 October, and the attorney general made
20 a presentation. At that time, we did
21 have an attorney from a large patent
22 law firm in Spokane with some
23 concerns.

24 So, obviously, there's a
25 balancing act here. And, of course,

1 his concern was the legitimate
2 exercise of his best legal advice and
3 sending out some cease and desist
4 letters, I guess you would call them,
5 to the companies who were infringing
6 on his clients' patents.

7 So the legitimate use of that
8 letter -- he was afraid this
9 legislation might put a damper on the
10 legitimate use, so we have got a
11 balance here. And I'm sure some of
12 the other speakers will talk to that.

13 There definitely have been
14 abuses. We had some testimony from
15 the home builders in southwest
16 Washington about problems they have
17 with some of these letters going out.

18 MR. FROCKT: Well, thank you
19 very much for hearing the bill this
20 morning, and I look forward to the
21 discussion as the bill moves through
22 the process. Thank you.

23 MR. CHAIRMAN: All right. Thank
24 you. We will call up Mark Allen and
25 John Nelson.

1 MR ALLEN: Good morning, Mr.
2 Chairman, members of the committee.
3 For the record, Mark Allen
4 representing the Washington State
5 Association of Broadcasters. Our
6 local radio stations throughout the
7 State of Washington have been targets
8 of a company that claims that it has a
9 patent for putting music on a hard
10 drive, which is where most radio
11 station music resides anymore. When I
12 was a disk jockey, there were 45
13 records and you had to put them on a
14 turntable and play them. Now it's
15 just press a button.

16 A number of these -- this
17 company has actually -- is involved in
18 federal litigation right now with a
19 number of the large radio broadcasting
20 companies, but they have also targeted
21 a number of our small radio stations
22 throughout the State of Washington
23 claiming that they have a patent on
24 the process for putting this music on
25 the hard drive and getting it out on

1 the air.

2 I will be very brief. These are
3 small stations. As Senator Frockt
4 said, they are very small businesses.
5 They really can't afford to mount a
6 large defense of these of these,
7 although I'm not sure that any of them
8 at this point have knuckled under and
9 met the demands for payment for a
10 license fee.

11 The federal litigation has been
12 stayed while the patent office reviews
13 these patents, and so at that point
14 there was little pressure on the local
15 stations to settle.

16 But once that federal litigation
17 moves forward, and it is starting to
18 do that now, they may again be
19 targeted. One of the stations told me
20 that they had even had two threatening
21 phone calls.

22 So this is a problem for our
23 small radio stations throughout the
24 State of Washington, and we are in
25 support of the bill and appreciate the

1 committee's consideration.

2 With that, I will conclude my
3 testimony and be happy to answer any
4 questions.

5 MR. CHAIRMAN: Any questions for
6 Mr. Allen?

7 Thanks very much for your
8 testimony this morning.

9 Mr. Nelson.

10 MR. NELSON: Good morning,
11 Mr. Chair, members of the committee.
12 My name is John Nelson. I'm a
13 consumer protection attorney for the
14 Office of the Attorney General for the
15 State of Washington. And, obviously,
16 I'm here today in support of the
17 Patent Troll Prevention Act.

18 What I would like to do
19 initially is just provide an overview
20 of the problem and then ultimately
21 what the bill seeks to do.

22 We have already heard today that
23 patent trolls primarily target small
24 businesses, and that's noteworthy
25 because they target individuals and

1 businesses who don't have general
2 counsel or built in either, you know,
3 stable of attorneys or alternatively
4 large coffers of money to use to
5 defend these cases.

6 And to give some context of the
7 overall cost of defending these cases,
8 recent studies indicate that about
9 \$29 billion a year goes into defending
10 these types of cases, which is a
11 noteworthy sum of money. And what
12 they do --

13 MR. CHAIRMAN: Let me ask you a
14 question right there, Mr. Nelson. Are
15 you insinuating that all the cases are
16 one-sided, that every time a patent
17 attorney sends out a letter that
18 they're doing it fraudulently? You
19 kind of make it sound like that when
20 you say \$29 billion all spent. I
21 assume some of that money was spent
22 legitimately.

23 MR. NELSON: That's correct.
24 And the 29 billion is an estimate of
25 defense where I guess the study

1 indicates that they're baseless claims
2 to be more specific. So -- and to
3 answer your question directly, yes
4 there are -- what this bill seeks to
5 do is not in any way inhibit the
6 protection of intellectual property
7 whatsoever.

8 And one of the noteworthy things
9 about the bill is that is specifically
10 lays out what is operating in good
11 faith. We don't simply say here's
12 what bad faith is. We say, hey, we
13 support the time and capital required
14 to come up with many of these patents
15 and inventions, and here's what, you
16 know, we think is a good faith effort
17 to defend those.

18 And to put this in perspective
19 as to how this affects the State of
20 Washington, for instance, between
21 September 2012 and May of 2013, one
22 large entity sent demand letters to
23 16,000 small businesses across the
24 country, including 331 small
25 businesses here in Washington. And

1 the real issue of course is they do so
2 with a lack of due diligence. They
3 are blindly sending out letters, and
4 many of them use nothing more than
5 purchased business data.

6 For instance, they say I would
7 like to know every small business in
8 King County that employs between 20
9 and a hundred individuals who may use
10 a copier. And the use of copying
11 mechanisms and procedures obviously
12 has been a real problem and a target
13 for these individuals.

14 But as I mentioned before, this
15 bill is intended to do four things.
16 First, it would prohibit
17 patent-holding firms from sending out
18 demand letters in bad faith.

19 Specifically, it would require the
20 person or entity asserting the claim
21 to have acted in good faith prior to
22 sending a demand letter.

23 Second, it would create a set of
24 factors for courts to use utilize in
25 determining what constitutes bad faith

1 in the course of patent enforcement
2 actions.

3 Third, it would create a set of
4 factors for courts to utilize in
5 determining what constitutes good
6 faith in the course of patent
7 enforcement actions thereby protecting
8 legitimate patent infringement
9 actions. And again, I want to harp on
10 that point. That's a built-in
11 protection.

12 And finally, it would create
13 public awareness about patent trolls
14 and in the process inoculate small
15 business owners against these tactics.

16 And I would close by addressing
17 one of the questions regarding recent
18 litigation regarding patent troll
19 matters. There are about 17 or 18
20 states that have statutes addressing
21 patent trolling. And the most
22 noteworthy one right now, for purposes
23 of litigation, involves the state of
24 Vermont where an entity attempted to
25 remove the action to federal court,

1 and twice federal court as kicked it
2 back to state court, which is a very
3 good indicator about our ability
4 specifically to address what are
5 unfair and deceptive, you know,
6 language within a demand letter.

7 Thank you. I urge your support,
8 and I'm here for any questions.

9 MR. CHAIRMAN: Senator Peterson
10 has a question for you.

11 MR. PETERSON: Thank you very
12 much, Mr. Chair.

13 I'm wondering whether you could
14 speak to the testimony of the previous
15 speaker about letters, so a situation
16 in which there's an active dispute in
17 federal court, so apparently an actual
18 patent and some basis for that
19 continuing.

20 How do you see this bill
21 affecting that kind of a situation?

22 MR ALLEN: Sure. One noteworthy
23 part about this proposed legislation
24 is that it does not involve a private
25 cause of action.

1 First and foremost, the attorney
2 general would be the gatekeeper.

3 Secondly, those factors that we
4 proposed in the bill which outline
5 good faith really protect those
6 companies. And, really, what the
7 state would be asking these businesses
8 to do is, first off, verify that the
9 patent exists, reference it with a
10 number, specifically tie it to a
11 business practice of that small
12 business and then, you know, provide
13 reasonable deadlines and other things.

14 Instead, what happens is they
15 send the letter out, they say you're
16 violating this patent. If you don't
17 contact us within ten days or five
18 days, we are going to file suit
19 against you.

20 So, really, it shouldn't effect
21 the honest protection of patents
22 because when those letters come out,
23 there will have been a good faith, you
24 know, sort of due diligence done to
25 protect that patent and show that

1 business owner we're legitimate. You
2 can either enter into a license
3 agreement with us or you can defend
4 the litigation in court.

5 MR. CHAIRMAN: Thank you both
6 very much.

7 We'll next call up Nathan Gordon
8 and Jessica Fortescue.

9 MR. GORDON: Good morning,
10 Mr. Chair. Good morning, committee.
11 Thank you for the opportunity to
12 testify this morning. My name is
13 Nathan Gordon here representing the
14 Washington Association of Realtors,
15 and I want to thank Senator Frocht and
16 Senator Fain and the attorney general
17 as well for putting forward this
18 consumer protection bill.

19 The reason the Realtors are here
20 testifying about this bill is, as you
21 can imagine, many of my folks scan
22 documents. And so what we are seeing,
23 both in Washington and across the
24 country, is Realtors who are using
25 scanners. They're using them in the

1 way that scanner was intended to be
2 used. They're getting letters because
3 some small part inside the scanner,
4 the patent on that small part as
5 expired, and some outside company has
6 bought up the rights to that patent.

7 And now they're getting a letter
8 saying you are using this in violation
9 of our patent, and you need to
10 basically write us a \$250 check or
11 else we are going to pull you into a
12 lawsuit. And that's happening all
13 across the country for different
14 things.

15 I know talking to the builders
16 who may be here to testify, same thing
17 is happening to them with fans. And
18 so this is an important problem that I
19 think needs some resolution here in
20 the state.

21 We were a big part of the
22 federal group that worked with
23 Congress to try to get a resolution.
24 We were disappointed but not surprised
25 that they couldn't get the ball across

1 the line, and we would ask that you do
2 that here for us today. Thank you.

3 MR. CHAIRMAN: All right. Any
4 questions?

5 Go ahead, Ms. Fortescue.

6 MS. FORTESCUE: Chair Patent,
7 members of the committee thank you for
8 the opportunity to speak before you
9 this morning. For the record, my name
10 is Jessica Fortescue, and I'm here on
11 behalf of the Washington Bankers
12 Association, which represents
13 commercial banks operating in every
14 county across the state ranging in
15 size from large, multistate financial
16 institutions to smaller family-owned
17 and community-based banks.

18 I'm also here this morning on
19 behalf of the United Financial Lobby,
20 which is a group of stakeholders that
21 come together to represent the broad
22 interests of the financial district in
23 Washington State.

24 We come before you today the
25 express our strong support of Senate

1 Bill 5059, which will create a means
2 of addressing and hopefully in the
3 long term preventing bad faith patent
4 infringement claims.

5 We greatly appreciate the
6 attorney general's leadership on this
7 measure as well as the legislative
8 sponsors, and we believe this is the
9 proactive approach that Washington
10 State should also take, along with a
11 number of other states that have
12 passed this measure in the last couple
13 of years.

14 In banks, for example, one area
15 that we have seen this activity is in
16 cash or ATM machines where a
17 nonpracticing entity purchases an
18 overly broad tech or software patent
19 and then turns around and makes an
20 assertion of bad faith -- or makes an
21 assertion of patent infringement for
22 smaller banks, for example, if they
23 use or continue using the ATM
24 machines.

25 So we believe that the risks of

1 these abusive patent infringement
2 claims impacts nearly every industry,
3 and, in particular, there are serious
4 concerns for banks of every size
5 across the State of Washington.

6 And we thank you for your
7 support of this measure, and I'm happy
8 to se any questions.

9 MR. CHAIRMAN: Thank you both
10 very much. And there does not appear
11 to be any questions.

12 Next call up, Mark Johnson.

13 And while he's coming up, I note
14 for the record that Michael Temple has
15 signed in on behalf Washington State
16 Association for Justice, not wishing
17 to testify but indicating concerns
18 with the bill. And, Mr. Temple, I see
19 you back there. If you could get the
20 committee staff what those concerns
21 are, and we would appreciate it.

22 (End of excerpt of proceedings.)

23

24

25

CERTIFICATE

THE STATE OF FLORIDA)

COUNTY OF PINELLAS)

I, ERICA FIELD, stenographic court reporter, do hereby certify that I was authorized to and did listen to and stenographically transcribed the foregoing video-recorded proceedings and that the transcript is a true record to the best of my ability.

Signed this 1st day of April, 2022.



Erica Field, FPR

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<p>business 7:11,14,21 15:5,7 16:15 18:11,12 19:1</p> <p>businesses 6:25 11:4 12:24 13:1 14:23,25 18:7</p> <p>button 10:15</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>call 9:4,24 19:7 23:12</p> <p>called 8:6</p> <p>calls 11:21</p> <p>capacity 6:11</p> <p>capital 14:13</p> <p>case 4:16 7:17</p> <p>cases 13:5,7,10,15</p> <p>cash 22:16</p> <p>cease 9:3</p> <p>Chair 12:11 17:12 19:10 21:6</p> <p>Chairman 2:3 4:13 5:1,7,15 8:4 9:23 10:2 12:5 13:13 17:9 19:5 21:3 23:9</p> <p>challenge 7:18</p> <p>chapter 3:9</p> <p>check 4:25 20:10</p> <p>claim 15:20</p> <p>claiming 10:23</p> <p>claims 10:8 14:1 22:4 23:2</p> <p>Clause 2:17</p> <p>clients' 9:6</p> <p>close 16:16</p> <p>coffee 5:20</p> <p>coffers 13:4</p> <p>comment 8:3</p> <p>commercial 21:13</p> <p>committee 2:12 5:5 6:3 8:14 10:2 12:11 19:10 21:7 23:20</p> <p>committee's 12:1</p> <p>community-based 21:17</p> <p>companies 9:5 10:20 18:6</p> <p>company 7:9 10:8,17 20:5</p> <p>concern 9:1</p> <p>concerns 8:8,23 23:4,17,20</p>	<p>conclude 12:2</p> <p>Congress 20:23</p> <p>consideration 12:1</p> <p>constitutes 15:25 16:5</p> <p>Constitution 2:16,18</p> <p>consumer 4:6,9 6:12 12:13 19:18</p> <p>contact 18:17</p> <p>context 13:6</p> <p>continue 22:23</p> <p>continuing 17:19</p> <p>copier 15:10</p> <p>copying 15:10</p> <p>correct 13:23</p> <p>cosponsoring 6:1</p> <p>cost 7:21 13:7</p> <p>counsel 2:11 13:2</p> <p>country 14:24 19:24 20:13</p> <p>county 15:8 21:14</p> <p>couple 6:2 22:12</p> <p>court 3:18 4:16,24 16:25 17:1,2,17 19:4</p> <p>courts 15:24 16:4</p> <p>create 15:23 16:3,12 22:1</p> <p>creates 3:7</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>damper 9:9</p> <p>data 7:1 15:5</p> <p>date 2:25</p> <p>days 18:17,18</p> <p>deadlines 18:13</p> <p>dealing 4:17</p> <p>deceptive 4:6 17:5</p> <p>defend 13:5 14:17 19:3</p> <p>defending 7:9 13:7,9</p> <p>defense 11:6 13:25</p> <p>defer 8:13</p> <p>demand 3:13,22 7:4 14:22 15:18,22 17:6</p>	<p>demands 11:9</p> <p>desist 9:3</p> <p>determining 15:25 16:5</p> <p>deterrence 7:24</p> <p>developed 3:5</p> <p>diligence 15:2 18:24</p> <p>directly 14:3</p> <p>disappointed 20:24</p> <p>discussion 9:21</p> <p>disk 10:12</p> <p>dismiss 7:20</p> <p>dismissed 7:17</p> <p>dispute 17:16</p> <p>distribute 5:4</p> <p>district 5:11 21:22</p> <p>documents 19:22</p> <p>drive 10:10,25</p> <p>due 15:2 18:24</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>early 5:19</p> <p>effect 18:20</p> <p>effort 6:15 7:23 14:16</p> <p>employs 15:8</p> <p>end 23:22</p> <p>enforce 6:12</p> <p>enforcement 6:19 7:5,25 8:10 16:1,7</p> <p>enter 19:2</p> <p>entity 14:22 15:20 16:24 22:17</p> <p>essentially 6:7</p> <p>estimate 13:24</p> <p>evidence 3:20</p> <p>examine 8:15</p> <p>excerpt 23:22</p> <p>exclude 2:21</p> <p>exempt 8:10</p> <p>exercise 9:2</p> <p>exists 18:9</p>
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<p>expensive 7:14</p> <p>expired 20:5</p> <p>express 21:25</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact 6:17</p> <p>factors 3:19,21 15:24 16:4 18:3</p> <p>facts 3:25</p> <p>failing 4:3</p> <p>Fain 5:24 19:16</p> <p>faith 2:13 3:11,20,21 14:11,12,16 15:18,21,25 16:6 18:5,23 22:3,20</p> <p>family-owned 21:16</p> <p>fans 20:17</p> <p>favorable 4:18</p> <p>federal 2:16 5:2 6:8 10:18 11:11,16 16:25 17:1,17 20:22</p> <p>fee 11:10</p> <p>fighting 7:4</p> <p>file 7:18,19 18:18</p> <p>filed 3:1</p> <p>finally 16:12</p> <p>financial 21:15,19,22</p> <p>firm 8:22</p> <p>firms 15:17</p> <p>folks 19:21</p> <p>Ford 2:9,10,11 4:14,15,20 5:6 8:16</p> <p>foremost 18:1</p> <p>Fortescue 19:8 21:5,6,10</p> <p>forward 6:15 9:20 11:17 19:17</p> <p>fraudulently 13:18</p> <p>Frockt 2:5 5:8,10,14 8:17 9:18 11:3 19:15</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gatekeeper 6:18 18:2</p> <p>general 4:8 5:22 6:17 8:19 12:14 13:1 18:2 19:16</p> <p>general's 22:6</p> <p>Generally 2:23</p>	<p>getter 20:7</p> <p>give 7:3,24 13:6</p> <p>good 2:10 3:20 6:15 7:23 10:1 12:10 14:10,16 15:21 16:5 17:3 18:5,23 19:9,10</p> <p>Gordon 19:7,9,13</p> <p>government 2:20</p> <p>granted 2:20</p> <p>greatly 22:5</p> <p>grew 5:16</p> <p>group 20:22 21:20</p> <p>guess 9:4 13:25</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>happening 6:21 20:12,17</p> <p>happy 12:3 23:7</p> <p>hard 10:9,25</p> <p>harp 16:9</p> <p>Hawthorn 5:12</p> <p>heard 12:22</p> <p>hearing 5:21 8:17 9:19</p> <p>hey 14:12</p> <p>Hills 5:13</p> <p>hire 7:15</p> <p>home 9:15</p> <p>honest 18:21</p> <p>hundred 15:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>imagine 19:21</p> <p>impacts 23:2</p> <p>important 6:20,22 20:18</p> <p>include 3:21,22</p> <p>including 14:24</p> <p>indicating 23:17</p> <p>indicator 17:3</p> <p>individuals 12:25 15:9,13</p> <p>industry 23:2</p> <p>information 3:23 4:4</p>	<p>infringed 3:15</p> <p>infringement 2:14 3:10,12 16:8 22:4,21 23:1</p> <p>infringing 4:2 9:5</p> <p>inhibit 14:5</p> <p>initially 12:19</p> <p>inoculate 16:14</p> <p>inside 20:3</p> <p>insinuating 13:15</p> <p>instance 14:20 15:6</p> <p>institutions 21:16</p> <p>intellectual 2:19 8:7,12 14:6</p> <p>intended 15:15 20:1</p> <p>intent 4:18</p> <p>interests 21:22</p> <p>invention 2:23 3:4</p> <p>inventions 14:15</p> <p>inventor 2:21</p> <p>involve 17:24</p> <p>involved 10:17</p> <p>involves 16:23</p> <p>issue 15:1</p> <p>issues 4:17</p> <p>item 2:4</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>January 2:3</p> <p>Jessica 19:8 21:10</p> <p>jockey 10:12</p> <p>John 9:25 12:12</p> <p>Johnson 23:12</p> <p>join 5:25</p> <p>Justice 23:16</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>kicked 17:1</p> <p>kind 5:16 6:18 13:19 17:21</p> <p>kinds 6:24 8:1</p> <p>King 15:8</p>
---	---	---

knuckled 11:8	Mark 9:24 10:3 23:12	opportunity 19:11 21:8
L	matters 16:19	order 3:17
lack 15:2	means 22:1	organizations 7:2
language 17:6	measure 22:7,12 23:7	outline 18:4
large 8:21 10:19 11:6 13:4 14:22 21:15	mechanisms 15:11	overly 22:18
law 2:15,16 4:23 8:22	members 5:5 6:2 10:2 12:11 21:7	overview 12:19
laws 6:13	mentioned 15:14	owner 3:25 19:1
lawsuit 3:18 20:12	met 11:9	owners 16:15
lawyer 7:15,16	Michael 23:14	P
lays 14:10	money 7:22 13:4,11,21	part 17:23 20:3,4,21
leadership 22:6	morning 2:10 5:19,25 9:20 10:1 12:8,10 19:9,10,12 21:9,18	participating 7:11
legal 3:3 9:2	motion 7:19	party 8:6
legislation 4:19 5:2,4 9:9 17:23	mount 11:5	passed 22:12
legislative 22:7	moves 9:21 11:17	patent 2:13,15,19,24 3:1,2,5,8,10,11, 15,23,25 4:3 6:6 7:5 8:11,21 10:9,23 11:12 12:17,23 13:16 16:1,6,8,13,18, 21 17:18 18:9,16,25 20:4,6,9 21:6 22:3,18,21 23:1
legitimate 7:25 9:1,7,10 16:8 19:1	multistate 21:15	patent-holding 15:17
legitimately 13:22	music 10:9,11,24	patented 3:4
letter 8:5 9:8 13:17 15:22 17:6 18:15 20:7	N	patents 9:6 11:13 14:14 18:21
letters 9:4,17 14:22 15:3,18 17:15 18:22 20:2	Nathan 19:7,13	payment 11:9
level 6:9	neighborhood 5:12	percent 6:23 7:3
license 3:16 11:10 19:2	Nelson 9:25 12:9,10,12 13:14,23	person 3:9,12 4:11 15:20
licensed 3:6	nonexclusive 3:19	perspective 14:18
litigation 3:14,17 4:21 7:19 10:18 11:11,16 16:18,23 19:4	nonpracticing 22:17	Peterson 17:9,11
litigator 7:7	normal 7:11	phone 11:21
Lobby 21:19	note 23:13	piece 7:12
local 10:6 11:14	noteworthy 12:24 13:11 14:8 16:22 17:22	play 10:14
long 22:3	number 3:24 6:1 10:16,19,21 18:10 22:11	point 11:8,13 16:10
lot 7:21	O	practice 18:11
M	obtain 3:16	practicing 7:7
machines 22:16,24	October 8:19	preempted 6:10
made 8:19	offering 2:22	presentation 8:20
make 3:10 13:19	office 3:2 11:12 12:14	press 10:15
makes 22:19,20	offices 8:13	pressure 11:14
making 2:22	one-sided 13:16	prevent 6:20
management 8:11,12	operating 14:10 21:13	preventing 22:3
		Prevention 3:8 12:17

previous 17:14
primarily 12:23
prime 2:6 5:8
prior 15:21
private 17:24
proactive 22:9
problem 6:5,6 11:22 12:20 15:12 20:18
problems 6:8 9:16
procedures 15:11
proceedings 2:2 23:22
process 9:22 10:24 16:14
product 7:13
prohibit 15:16
property 2:20 8:12 14:6
proposed 17:23 18:4
protect 18:5,25
protecting 16:7
protection 4:7,9 6:13 12:13 14:6 16:11 18:21 19:18
provide 4:3 12:19 18:12
public 16:13
pull 20:11
purchased 15:5
purchases 22:17
purposes 16:22
put 6:15 9:9 10:13 14:18
putting 10:9,24 19:17

Q

question 6:9 8:15 13:14 14:3 17:10
questions 4:14 12:4,5 16:17 17:8 21:4 23:8,11
quickly 7:17

R

radio 10:6,10,19,21 11:23
ranging 21:14
real 15:1,12

Realtors 19:14,19,24
reason 19:19
reasonable 18:13
received 8:5
recent 4:16,21 13:8 16:17
record 10:3 21:9 23:14
records 10:13
reference 18:9
relating 3:25
remove 16:25
represent 21:21
representing 5:9,10 10:4 19:13
represents 21:12
require 15:19
required 14:13
requirement 3:3
resides 10:11
residing 4:11
resolution 20:19,23
reverse 6:21
reviews 11:12
rights 20:6
risks 22:25
Rule 7:18
ruled 4:24

S

sale 2:22
scan 19:21
scanner 20:1,3
scanners 19:25
Section 2:17
seeks 12:21 14:4
selling 2:23
Senate 2:5,12 3:7 21:25
Senator 2:5 5:8,10,24 8:17 11:3 17:9 19:15,16
send 18:15
sending 9:3 15:3,17,22

sends 3:12 13:17
September 14:21
serve 6:18
set 15:23 16:3
settle 11:15
show 18:25
signed 6:2 23:15
simply 14:11
situation 7:8 17:15,21
size 21:15 23:4
small 6:25 7:21 10:21 11:3,4,23 12:23 14:23,24 15:7 16:14 18:11 20:3,4
smaller 21:16 22:22
software 22:18
sold 3:6
sort 6:7,20 18:24
sound 13:19
southwest 9:15
speak 5:24 17:14 21:8
speaker 17:15
speakers 9:12
specific 3:23 4:1 14:2
specifically 14:9 15:19 17:4 18:10
spent 13:20,21
spirit 4:18
Spokane 8:18,22
sponsor 2:6 5:8
sponsors 22:8
stable 13:3
staff 23:20
stakeholders 21:20
started 6:5
starting 11:17
state 4:10,12,23 7:25 10:4,7,22 11:24 12:15 14:19 16:23 17:2 18:7 20:20 21:14,23 22:10 23:5,15
states 2:18 4:21 16:20 22:11
station 10:11
stations 10:6,21 11:3,15,19,23

<p>statutes 4:22 16:20</p> <p>stayed 11:12</p> <p>stop 8:1</p> <p>strong 21:25</p> <p>studies 13:8</p> <p>study 13:25</p> <p>suit 18:18</p> <p>sum 13:11</p> <p>support 11:25 12:16 14:13 17:7 21:25 23:7</p> <p>Supreme 4:24</p> <p>surprised 20:24</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tactics 16:15</p> <p>talk 9:12</p> <p>talked 6:4</p> <p>talking 20:15</p> <p>target 3:13,15,16 4:1,2 12:23,25 15:12</p> <p>targeted 10:20 11:19</p> <p>targets 6:24 10:7</p> <p>tech 22:18</p> <p>technology 7:12</p> <p>Temple 23:14,18</p> <p>ten 18:17</p> <p>term 2:24 22:3</p> <p>testify 2:8 19:12 20:16 23:17</p> <p>testifying 19:20</p> <p>testimony 9:14 12:3,8 17:14</p> <p>thing 20:16</p> <p>things 14:8 15:15 18:13 20:14</p> <p>threatening 3:13 11:20</p> <p>tie 18:10</p> <p>Tim 2:11</p> <p>time 7:6 8:20 13:16 14:13</p> <p>Title 3:9</p> <p>today 12:16,22 21:2,24</p> <p>told 11:19</p>	<p>tool 7:25</p> <p>top 7:20</p> <p>tracking 7:3</p> <p>Trademark 3:2</p> <p>troll 3:8 12:17 16:18</p> <p>trolling 6:7 16:21</p> <p>trolls 12:23 16:13</p> <p>turns 22:19</p> <p>turntable 10:14</p> <p>types 13:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. 2:15 3:1 4:24</p> <p>ultimately 12:20</p> <p>unfair 4:5 17:5</p> <p>United 2:18 21:19</p> <p>universities 8:8</p> <p>urge 17:7</p> <p>utilize 15:24 16:4</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>Valley 8:18</p> <p>Ventures 8:7</p> <p>verify 18:8</p> <p>Vermont 16:24</p> <p>vibrant 5:12</p> <p>violating 18:16</p> <p>violation 4:5 20:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Washington 9:16 10:4,7,22 11:24 12:15 14:20,25 19:14,23 21:11,23 22:9 23:5,15</p> <p>whatsoever 14:7</p> <p>wishing 23:16</p> <p>wondering 17:13</p> <p>words 5:17</p> <p>worked 20:22</p> <p>write 20:10</p>	<p>wrong 7:10</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year 13:9</p> <p>years 2:24 22:13</p>
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